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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 998

ALEXANDER J. BIELSKI,

Petitioner,

vs.

EMERSON SAMUELS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

ALEXANDER J. BIELSKI,

Petitioner,

vs.

EMERSON SAMUELS.

Petition for Writ of Certiorari

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petition of Alexander J. Bielski respectfully prays your Honorable Court that a Writ of Certiorari may issue, to review and reverse the final judgment of the Supreme Court of Pennsylvania, being the highest Court of the Commonwealth of Pennsylvania, entered January 31, 1941, at No. 15 March Term, 1941, affirming the Superior Court of Pennsylvania, which had affirmed the Court of Common Pleas of Allegheny County, Pennsylvania, which Judgment was rendered against your petitioner, and in favor of Emerson Samuels, respondent, and in which Supreme Court of Pennsylvania your petitioner specially set up and claimed the right and privilege under the due process clause of

the Fourteenth Amendment to the Constitution of the United States against being deprived of property without being afforded a hearing in which he should be permitted *actual* opportunity to be heard by his testimony, and that of witnesses, and by cross-examination, in his defense, and to have findings based on such testimony, and not to have his rights concluded by records of proceedings to which he could not have been a party, and in which Supreme Court judgment the decision necessarily involved denial of the Federal Constitutional right claimed.

I. Statement of the Matter Involved.

This is a statutory proceeding by a junior creditor for reduction of a prior confessed judgment under the Pennsylvania Act of 1897, P. L. 237, 12 PS 911, brought by respondent Emerson Samuels, as assignee of a junior judgment, against petitioner as assignee of judgment bond and accompanying first mortgage, on the ground that petitioner had entered judgment on the bond for what was actually owing thereon by the debtor, instead of merely the amount of petitioner's last payment on his installment purchase of the bond and first mortgage, which action respondent Samuels asserted to be fraudulent as to him.

Petitioner does not question the constitutionality of the statute, but rather of the procedure by which he was condemned without being heard.

The Supreme Court of Pennsylvania affirmed the lower courts in reducing petitioner's judgment to the amount of his last payment on his installment purchase of the bond and mortgage, and branded him with fraud, while refusing petitioner's claim of constitutional right to actually be heard in his own defense to show the truth, by cross-examination, and by evidence from himself and his witnesses,

as to what he had paid for the bond and mortgage, and what was actually owing thereon by the mortgage debtor.

In 1924 Anastasia Bielski, mother of petitioner, joined with her husband, since deceased, in giving to John McB. Donaldson a judgment bond and accompanying first mortgage, payable in three years, in the sum of $2,750.00, with interest at 6%, and containing the usual clauses as to taxes, insurance, etc. (R.13 a, 8 a-12 a.) With interest alone, excluding insurance and taxes, this debt would have amounted to $4,950.00 on June 8, 1939, when respondent Samuels says he saw the mortgage open of record in the Recorder's Office before he entered upon his speculation. (R. 13 a-14 a).

The mortgagor had never been able to pay anything on this debt, and there is not a breath of evidence that she had. The fact that rentals from the property had been collected by the successive owners of the mortgage reduced the amount otherwise owing by the mortgage debtor for principal, interest, taxes, and insurance, as of January 9, 1940, from the enormously larger sum which would otherwise have been owing, to $4,225.38, to which was added in accordance with the terms of the bond, (R. 10 a) attorney's commission of $211.27, making a total then owing *by the mortgagor* of $4,436.65 (R. 6 a), for which sum judgment was entered by the petitioner after he completed his installment purchase of bond and mortgage. Naturally, during the period petitioner had been paying the previous owners of the bond and mortgage his installments of the purchase price thereof, each of his payments correspondingly reduced the balance still owing *to them,* without thereby constituting credits to the mortgage debtor as against him, as purchaser.

There is not a breath of evidence that this sum of $4,436.65 is not exactly what was *owing by the mortgagor* on

the date judgment was confessed for that amount, although it is *undisputed by petitioner,* as well as redundantly proved by respondent, that the amount of *the last payment due the successors of the mortgagee on account of the installment purchase by petitioner of the bond and mortgage* at the time of the formal assignment of the bond and mortgage to petitioner (R. 28 a-29 a) was only $1,750.82, plus a little interest.

After the first mortgage, various judgments were entered against the mortgagor, including one by First National Bank of Duquesne, originally entered in 1928, and subsequently twice revived, and eventually purchased on June 8, 1939, by respondent, Emerson Samuels, for an undisclosed price, but nominally calling for $4,830.00, with interest from August 1, 1938. (R. 12 a-15 a.)

Subsequent to that junior judgment, now owned by respondent Samuels, was a 1931 judgment on a coal lease against petitioner's father and mother, as principals, and petitioner as surety. In 1932 petitioner was compelled to pay it, and thus became subrogated to the judgment creditors' rights in the judgment. (Details not in record, but fact of being a subsequent and junior creditor of the mortgagor appears at R. 59 a).

While petitioner's status as a junior lien creditor of the mortgagor, as above, is actually true, as the situation practically worked out it is not vital. As such junior lien creditor of his mother, the mortgagor, petitioner would have had an absolute right, for his own protection, to have purchased the first mortgage from Donaldson or his successors in title, regardless of their willingness to sell to him: *Kiedaisch v. Elkins Bank,* 325 Pa. 241, 246-7, and cases there cited. But regardless of his status as junior lien creditor, and even as a stranger, *with the consent of the*

owners of the first mortgage (which he had), he could buy it on mutually agreeable terms, and by installment payments, in which event his interest in equity at any time would be measured by the amount he had paid, leaving the previous owner of the mortgage as owner of the legal title thereto until full payment, but trustee for the purchaser as to the amount already paid in installments. In such situation there would be neither any duty on petitioner, as a purchaser of the first mortgage, to make his installment payments in *satisfaction* of the mortgage for the benefit of subsequent judgment creditors rather than as payments on account of *purchase* for his own benefit, nor presumption that he had done so. In fact the Pennsylvania presumption is to the contrary, the purchaser being under no obligation to *pay* the mortgage nor to make a gift to holders of subsequent liens: *Brice's Appeal,* 95 Pa. 145; ***Fair & Square Building & Loan Ass'n v. Presbyterian Board,*** 302 Pa. 162. The fact that his mother was the mortgage debtor, and that he may have desired to spend his own money to obtain control of the mortgage for her protection, did not either compel or presume him to have paid it rather to assist respondent Samuels in his speculation in a subsequent judgment against her.

There is nothing remotely inconsistent, as respondent has urged, between petitioner's two positions as a purchaser of the first mortgage in his right of subrogation as a subsequent creditor, for his own protection, regardless of the consent of the mortgage owners, and as a purchaser by agreement with the owners of the first mortgage. He simply had *both* rights to purchase the first mortgage, where either alone would have been sufficient.

In 1928 petitioner agreed with John McB. Donaldson, mortgagee, to purchase the mortgage, petitioner to keep

up taxes and interest and pay off the principal. The court refused to permit him to show it. (R. 56 a-61 a.) (The date of 1938 in the offer at R. 61 a is an obvious stenographic mistake for 1928, see R. 21 a, since Donaldson died about 1934.)

Following Donaldson's death, and later that of his widow, the bond and mortgage were twice inventoried in and distributed by the Orphans' Court in their respective estates, and assignments thereof made by the fiduciaries pursuant to Orphans' Court decree, in each case listing the *value to the estate* correctly for purposes of inheritance tax and distribution as only what chanced to be still owing *by petitioner* on his installment *purchase* of the bond and mortgage, and not on the basis of the *debt* still owing by the *mortgagor,* of which debt petitioner, by virtue of his previous payments of installments of purchase price, was largely equitable owner. *(Brice's Appeal,* 95 Pa. 145.) Neither petitioner, respondent, nor the mortgage debtor, were in any manner parties to those Orphans' Court proceedings, nor to the formal assignments pursuant thereto, nor was the *amount owing by the mortgagor,* as distinguished from the amount then remaining due the mortgagee and his successors on account of petitioner's installment contract of purchase, before the Orphans' Court at all. Due process of law under the Fourteenth Amendment made these *res inter alios acta* ineffective against petitioner: *Hansberry v. Lee,* 311 U. S. 32, 40-41. Yet the court admitted them against petitioner over objection (R. 25 a, 28 a), and the lower court (R. 69 a) and the Superior Court (R. 119-120, 124, 125-126, 127) treated them as conclusive against him. The Supreme Court baldly affirmed without discussing anything. (R. 144.) In doing so it necessarily decided against petitioner's Federal constitutional right in this particular, among others.

Following the death of Donaldson, petitioner renewed his agreement for purchase of and subrogation to the first mortgage, in his right as a junior lien creditor, as well as by consent of the holders of the mortgage, and paid thereon $2,618.33 of principal, and $1,069.16 of interest, and $489.80 on account of insurance premiums. The court refused to let him show it. (R. 56 a-61 a.) Meanwhile, commencing during Mrs. Donaldson's lifetime, and continuing under the Fidelity Trust Company which held one-third as trustee and two-thirds as executor of Mrs. Donaldson (R. 44 a), rental payments had been received and credited, by which the total owing by the mortgagor was reduced below what would otherwise have piled up. (R. 50 a.) The entry of judgment by petitioner against the mortgagor (R. 3 a-12 a) was *in the exact amount owing by the mortgagor,* and was kept down to that amount by crediting her with the rentals received. The payments by which the amount owing *to the estates* represented by the Fidelity was reduced to $1,750.72 plus interest were payments made by petitioner Alexander J. Bielski with his own money as a purchaser of the bond and mortgage, and not by the mortgage debtor. He was not allowed to show it. (R. 56 a-58 a.) He was confined only to the last installment payment, and not allowed to show the payments he had made before that. (R. 56 a-61 a.)

Though the mortgage debtor chanced to be his mother, petitioner protected himself by securing from her a certificate of no defense, which is exactly what the Supreme Court of Pennsylvania has declared to be the only thing necessary to protect such a purchaser of a first mortgage, and to relieve him from any duty of inquiring of subsequent encumbrancers, or potential purchasers of such subsequent encumbrances such as respondent Samuels: ***Fair and Square Building and Loan Association v. Pres-***

byterian Board, 302 Pa. 162, 169. The court refused to let him show it (R. 65 a, 66 a-68 a), and the Superior Court, at R. 122, seems to regard this compliance by him with his full legal duty under the declared law of Pennsylvania as something detrimental to his standing.

Petitioner had never heard of respondent Samuels at the time he did everything required by law to protect himself in his installment purchase of the bond and first mortgage, and could have had no thought of defrauding him. Accordingly, it is against a *bona fide* assignee without notice that the Pennsylvania courts have permitted the first mortgage debt to be reduced, without hearing his defense. There is no suggestion that the First National Bank of Duquesne, holder of the twice revived and very defaulted junior judgment which it sold to Samuels, had any illusions about the mortgage debtor having paid anything in reduction of her mortgage debt, for the benefit of their subsequent lien. In fact they had warned Samuels. (R. 40 a.) And there is nothing of the quality of negotiable paper about a very defaulted twice revived junior judgment, such as Samuels bought from the bank.

Under this state of affairs, in the spring of 1939 (R. 13 a) Emerson Samuels, respondent, a young law student, decided to try a speculation in the twice revived (R. 13 a) junior judgment against Mrs. Bielski, belonging to the First National Bank of Duquesne. He was *not* then a "member of the bar of Allegheny County," as assumed by the Superior Court at R. 119. At the hearing on February 7, 1940, he had been admitted to practice only about three months. (R. 30 a.) Mr. Bielski has been a practicing lawyer for twelve years. (R. 55 a.)

Respondent Samuels found open on the record the first mortgage for $2,750.00 with interest, etc., running from

1924. (R. 13 a, 32 a.) He knew that the possession of such an instrument indicates a right in the holder to recover according to its terms; that the holder is not required to prove nonpayment; that the burden of proving payment is on him who alleges it: *Whitney v. Hopkins,* 135 Pa. 246, 255. On the face of the record the mortgage debt would have been $4,950.00 plus taxes and insurance. He did not see or communicate with the mortgage debtor to determine what she owed on the mortgage. (R. 36 a.) The banker from whom he bought the ancient and precarious judgment told him the present petitioner had something to do with the situation, and to check into it very thoroughly. (R. 40 a.) He made no inquiries either of the present petitioner or of the mortgage debtor, but carefully confined himself to the records in which neither one was involved as a party. There he found, in two Orphans' Court proceedings with reference to estates in which petitioner and the mortgage debtor were in no manner involved, correct statements in inventories, decrees, and assignments pursuant thereto, as to the remaining *interests of the estates,* fractional or otherwise, in the mortgage which petitioner was purchasing by installments, and on which he had nearly completed his *purchase,* with consequent reductions in the remaining values to the estates. The basis for calculating somebody else's inheritance tax was correct. The distribution value to distributees of their remaining interests in the legal title to the mortgage was correct. Neither Mrs. Bielski, the mortgage debtor, nor her son Alexander J. Bielski, the present petitioner, equitable owner and purchaser of the mortgage by installments, had anything whatever to do with the Orphans' Court records, correct as they were as to all parties before the court. Constitutional due process under the Fourteenth Amendment gave them no weight against petitioner: *Hansberry v. Lee,* 311 U. S.

32, 40-41. Yet the Supreme Court of Pennsylvania has affirmed the lower courts in making them conclusive against him without hearing him as to the truth.

Having determined thereby to mislead himself to his profit, and carefully refraining from consulting the mortgage debtor as to what she owed, or to consult petitioner after being warned to do so, and in the face of the mortgage being open of record for its full amount plus fifteen years' interest, taxes, insurance, etc. (R. 13 a), Samuels betook himself exclusively to a clerk (R. 42 a) at the Fidelity Trust Company. (R. 40 a.) He confined himself to inquiries as to how much was owing to the Fidelity, and made no inquiry as to the identity or capacity of the person who had been paying on the mortgage, or what the *debtor* owed on the obligation. (R. 35 a.)

Respondent Samuels, in making his clandestine inquiries to the clerk, Lockhart, did not tell him that he was inquiring on his own behalf as a possible purchaser of a junior lien, in which capacity he now claims to have been deceived to his own profit. Instead this law student represented himself as being connected with a firm of attorneys in town, and as representing an unidentified man 80 years old. (R. 46 a.) Any representations made by Lockhart to Samuels were thus intended for the non-existent octogenarian client of the non-existent firm of attorneys, and not for the young law student who was deceiving Lockhart in the hope of obtaining information with which to deceive himself to his profit: *Ford Motor Co. v. Sweeten Auto Co.,* 318 Pa. 177, 180, 181; *Gillespie v. Hunt,* 276 Pa. 119, 126.

In no manner did Lockhart represent petitioner in what he was thus deceived into telling this purported legal representative of a non-existent octogenarian.

Repeatedly did Lockhart testify that what he told respondent Samuels was what was due "our estate". (R. 43 a, 44 a, 46 a.) He was not permitted to state who had been making the payments to bring down the amount due "our estate" on the mortgage (R. 46 a, 47 a, 48 a), what his dealings had been with petitioner in that connection (R. 46 a-48 a, 62 a-64 a), or as to anything that took place prior to 1938. These should have been the most important facts in the case: *Brice's Appeal,* 95 Pa. 145.

Having thus carefully limited his investigation to sources calculated to deceive himself to his own profit, Samuels became a purchaser "for value" of the antiquated twice revived and entirely non-negotiable junior judgment nominally calling for about $5,000. (R. 13 a.) What he actually paid for the bargain is nowhere hinted at.

Petitioner, still never having heard of respondent Samuels, completed payment of the $1,750.72 which *he* still owed as the last of his series of payments in his *purchase* of the bond and first mortgage, and received a formal assignment. (R. 28 a.) Judgment was entered in his favor by confession on the bond, for exactly what was owing by the mortgage debtor, including attorney's fee. (R. 3 a-12 a.)

Thereupon respondent Samuels presented his petition (R. 12 a-19 a) under the Pennsylvania Act of 1897, P. L. 237, 12 PS. 911, claiming that all above the amount of $1,750.72 plus interest which constituted petitioner's last payment on his installment purchase of the bond and mortgage was fraudulent as to him, Samuels.

The ultimate factual question was as to whether the mortgage debtor or the present petitioner had made the payments bringing the balance due the legal holders of the mortgage down to $1,750.72, and as to the intention of the present petitioner at the time of his previous payments, as

expressed to the parties to whom payments were made, as to whether his payments were on account of *purchase* of the obligation or of its *extinguishment* in favor of subsequent liens: *Brice's Appeal,* 95 Pa. 145; *Marshall v. Klein,* 96 Pa. Superior Ct. 580, 583, 584, 585; *Thomas v. Hartt,* 136 Pa. Superior Ct. 84, 89. Fraud being charged against petitioner, the widest latitude of proof was required: *Zerbe v. Miller,* 16 Pa. 488, 495.

With this factual question squarely presented, it glares from this entire record, from beginning to end, that this petitioner was not permitted to show that it was *he himself,* and *not the mortgage debtor,* who had *with his own money,* and *for his own legitimate protection,* and *by specific agreement with the holders of the mortgage,* reduced the amount still due the *legal holders of the mortgage* to $1,750.72, and that the latter figure was only what *he* still owed on his *purchase* of the mortgage, and *not* what the mortgage debtor owed, and that the evidence admitted from petitioner, and from the trust company clerk Lockhart, and on cross-examination of respondent Samuels, was carefully confined to what would build up Samuels' weak theory, and *exclude the truth as to the actual facts.*

This entire record shows just that. Among other places, Record, pages 25 a, 26 a, 30 a, 32 a, 36 a-37 a, 41 a, 42 a, 45 a, 46 a, 47 a-48 a, 55 a, 56 a, 57 a, 58 a, 59 a, 60 a, 61 a, 62 a, 63 a, 64 a, 65 a, show that from start to finish in this case there was a continual letting in of anything, hearsay or otherwise, which would build up Samuels' weak theory, and prevention of any proper cross-examination of Samuels or Lockhart, tending to bring out the truth, and absolute exclusion of anything offered by this petitioner tending to show the truth about *the most important facts on which the case should turn.*

The court below took $2,504.66, which petitioner had lawfully paid in previous installments on his purchase of the first mortgage for his own protection, and in effect presented it to respondent Samuels (R. 72 a), and in its opinion branded him with fraud after refusing to hear the truth.

On appeal, the Superior Court affirmed, and publicly branded with vile fraud an attorney of twelve years' excellent standing, without a suggestion that he had not been permitted to bring out the actual truth, and without a suggestion that Samuels was thereby profiting to the extent of $2,504.66 of petitioner's money through admittedly closing his eyes to opportunities to learn the truth.

In its opinion (R. 118-128) the Superior Court utterly ignored the fact that petitioner had been deprived of his day in court altogether, by being refused permission to tell his story, to produce evidence of the truth from witnesses and exhibits, and to cross-examine respondent Samuels and his witnesses as to the truth, and *assumed* the facts to be utterly contrary to what the record shows them to be. It did so by adopting the misleading printed brief of Samuels' extremely able counsel, including his statement of supposed facts, *verbatim,* without even change of punctuation, for six of the less than ten manuscript pages of the opinion. One of the other pages is taken up with a statutory quotation. Exact details appear at pages 138-142 of Petitioner's Reply in the Record. Such miscarriage of justice is exactly what is pointed out by your Honorable Court in *Edwards v. United States,* 85 L. Ed. Adv. 563, 568, as likely to follow such a refusal to permit an accused his constitutional right of cross-examination, and to present evidence in his defense.

Your petitioner petitioned the Supreme Court of Pennsylvania for review on *certiorari,* and urged the Federal

Constitutional question at pages 90-94, 114, and 115-116 of his Petition, and at pages 135-136 of his Reply, as now printed in this Record.

The Supreme Court of Pennsylvania allowed the appeal, R. 143, necessarily including the Federal Constitutional question of whether he was denied due process of law by being refused an *actual* opportunity to be heard in his defense.

Petitioner devoted twenty printed pages to argument of the constitutional question in his Supreme Court brief.

The Supreme Court of Pennsylvania baldly affirmed without discussing anything (R. 144), but in so doing necessarily decided against petitioner's claim of right under the due process clause of the Fourteenth Amendment to an actual hearing in which his evidence would be heard in his defense, before depriving him of his property.

II. Statement as to Jurisdiction.

A. Jurisdiction is invoked under Section 237 (b) of the Judicial Code, as amended by 43 Stat. at Large 936 (February 13, 1925), 28 U. S. C. sec. 344, providing that certiorari may issue to review "any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any right, title, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

B. Jurisdiction arises because the State of Pennsylvania, through its courts, affirmed by the Supreme Court, has deprived petitioner of property on the ground of records of matters in which he was in no manner involved, and in which the basic factual question here presented was in no manner involved, while refusing him his right to cross-examine and to be heard by evidence as to the facts of his de-

fense, in violation of his express claim of right to be heard under the "due process" clause of the Fourteenth Amendment to the Constitution of the United States. The factual issue, and the refusal to hear petitioner upon it, are set forth in the statement of the Matter Involved, *ante*.

C. The judgment of the Supreme Court of Pennsylvania was entered January 31, 1941, and this petition is filed April 29, 1941, within ninety days thereafter.

The question is unquestionably substantial, since the constitutional right to be heard is beyond question, and the question of whether due process has been refused, not by legislative action, but by judicial conduct of a particular case, can only be determined by independent examination of the record by this Court in the particular case: *Pierre v. Louisiana*, 306 U. S. 354, 358; *Milk Wagon Drivers Union v. Meadowbrook Dairies*, 85 L. Ed. Adv. 497, 499, 502; *Smith v. O'Grady*, 85 L. Ed. Adv. 548, 549.

In the summary proceedings in the court of first instance, the deprivation of constitutional right developed gradually by a long series of rulings, each doubtless error as to the law of evidence in view of the factual question presented, and any one standing alone not necessarily of constitutional import, but which, in their cumulative effect, developed into taking as conclusive against petitioner records of other proceedings in which he was in no manner concerned and in which the factual question here presented did not arise, forbidding him to cross-examine as to anything bearing on the factual question here presented, and forbidding him to offer any evidence as to the actual facts constituting his defense. This was *the whole conduct of the hearing*, as shown at R. 25 a, 26 a, 30 a, 32 a, 36 a-37 a, 41 a, 42 a, 45 a, 46 a, 47 a-48 a, 55 a, 56 a, 57 a, 58 a, 59 a, 60 a, 61 a, 62 a, 63 a, 65 a.

Your petitioner petitioned the Supreme Court of Pennsylvania for review of the Superior Court's affirmance, and urged the Federal Constitutional question at pages 90-94, 114, and 115-116 of his Petition, and at pages 135-136 of his Reply, as printed in this record, the latter showing how the question was urged in the Superior Court. The Supreme Court of Pennsylvania allowed the appeal, R. 143, necessarily including the Federal Constitutional question, against which respondent had objected in his Answer, R. 130-134.

In the Supreme Court, following the allowance of the appeal on the constitutional question, among others, the question was specifically presented in the statement of questions involved, and specifically urged for twenty pages of appellant's printed brief, as well as in oral argument, and appellee argued the contrary in brief and oral argument. This is all that can be done in the way of presentation of the question under Pennsylvania appellate practice, and naturally does not appear in the printed Record, except in the Petition for appeal and Reply, coupled with Supreme Court order allowing appeal generally, as aforesaid.

The Supreme Court baldly affirmed without discussing anything (R. 144), but in doing so necessarily decided against the constitutional right claimed. It made no suggestion that the constitutional question, as to which the Supreme Court had allowed appeal over objection, was being disregarded as supposedly not raised below, rather than decided adversely.

For the jurisdiction of this Court, it is enough that the question was raised in the Supreme Court of the State: *Sully v. American Nat. Bank,* 178 U. S. 289, 298; *Penna. R. R. Co. v. Hughes,* 191 U. S. 477, 484; *Missouri K. & T. Ry.*

Co. v. Elliott, 184 U. S. 530, 533-4. It is enough that the Federal question was squarely presented to the State Supreme Court, and necessarily denied by its order, although not discussed in its opinion: *C. B. & Q. R. R. Co. v. Chicago,* 166 U. S. 226, 231-2. On judicial, as distinguished from legislative violations of due process, no one can say in advance that the courts will violate constitutional inhibitions, and the matter is necessarily left to the revisory power of the higher courts of the state, and ultimately of this Court: *Virginia v. Rives,* 100 U. S. 313, 319. Finally deciding a case against a defendant without ever giving him an opportunity to present his evidence violates due process, and there is no duty to anticipate such result and raise the question before it happens; *Saunders v. Shaw,* 244 U. S. 317. Doubtless the state court's holding is conclusive (without discussion of that or anything else in the opinion) that similar state constitutional provisions have not been infringed, but the state court must necessarily pass upon Federal constitutional rights claimed, and the matter is reviewable here where the latter are necessarily refused by the decision of the state court: *Smith v. O'Grady,* 85 L. Ed. Adv. 548, 549.

The Common Pleas opinion is printed at R. 68 a-72 a, the Superior Court opinion at R. 118-128, and that of the Supreme Court at R. 144.

III. Question Presented.

Does Federal due process of law, under the Fourteenth Amendment, permit a State, through its judiciary, to deprive a litigant of his property, by treating as conclusive against him records of other proceedings to which he was not a party, and in which the factual question now presented did not arise, and refusing him a hearing in which he will actually be heard in his defense by cross-examination,

and by production of his evidence, directed to bringing out the truth as to the actual facts on which the case should turn?

IV. Reasons for Allowance of the Writ.

The Supreme Court of Pennsylvania, being the highest Court of Pennsylvania, has decided a Federal Question of substance, to wit whether the due process clause of the Fourteenth Amendment permits a litigant to be deprived of property, upon a question of fact involving accusations of fraud, without being afforded a hearing in which he shall have *actual* opportunity to be heard by himself and his witnesses, and to cross-examine his opponent to bring out the truth, and to have findings made on such evidence; and whether Federal due process permits proceedings between others on different matters conclusive effect on one not a party thereto.

The decision was necessarily adverse to the claimed Federal Right.

The decision is probably not in accordance with applicable decisions of your Honorable Court.

If, as the Pennsylvania courts would appear to have been misled into supposing, the actual balance owing *by the mortgagor* was only $1,750.72, and petitioner paid that amount only and then attempted to collect $4,436.65 thereon, to the prejudice of junior lien creditors, the fraud would be obvious. It is of such fraud that petitioner,—whose reputation is necessarily vital to his professional life as an attorney,—has been *convicted without being heard.*

But if, on the contrary,—as is the actual fact,—the *actual indebtedness of the mortgagor* was $4,225.38, plus attorney's commission, and the reason only $1,750.72 was due

the successors of the mortgagee was that petitioner had previously lawfully paid to the mortgagee and his successors the difference, in the legitimate installment purchase of the mortgage, then the taking of petitioner's previously paid $2,504.66, and the giving of it to respondent Samuels, who had carefully kept himself in ignorance of the true facts, after being warned to investigate, is most unjust, as well as the branding of entirely legitimate business conduct as fraudulent, with consequent irreparable damage to the most priceless asset of a practicing attorney in good standing.

It was the *actual facts* of the latter character which the lower court, affirmed by the Superior and Supreme Courts, refused to hear.

Had the lower court, sitting to try the facts, disbelieved evidence of these actual facts, a different question would have been presented, and not one of violation of Federal due process.

Instead, affirmed by the Superior and Supreme Courts of Pennsylvania, it *refused to hear it,* thereby depriving itself of opportunity to pass upon its credibility.

Due process of law, while nowhere defined in detail, requires not only notice, but fair opportunity to be heard before the issues are decided: *Iowa Cent. R. R. v. Iowa,* 160 U. S. 389, 393. The mere right to object is not enough; the party must have opportunity to submit proof in support of his allegations: *Londoner v. Denver,* 210 U. S. 373, 386. Deciding a case against a defendant without ever giving him an actual opportunity to present his evidence violates due process: *Saunders v. Shaw,* 244 U. S. 317. Due process requires full hearing, including the right to present evidence and have findings based thereon: *B. & O. R. R. Co. v. U. S.,* 298 U. S. 349, 368-9. The opportunity to be

heard is essential: *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 476. In its primary sense the phrase means an opportunity to present one's case and to be heard in its support: *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673. The fundamental requirement is an opportunity for hearing and defense: *Ballard v. Hunter,* 204 U. S. 241, 255.

The record throughout shows beyond controversy that petitioner had no more *actual* opportunity to be heard in this case than if the door of the hearing room had been locked in his face, and the proceedings conducted *ex parte* to permit Samuels to establish his strained theory, without being handicapped by cross-examination or testimony as to the truth.

And the constitutional requirement of an opportunity to be heard means a *real opportunity,* and surely something more than going through the form of a hearing in which the entire question was the *actual* intention of the parties when petitioner made his payments to the holders of the mortgage (*Brice's Appeal,* 95 Pa. 145; *Marshall v. Klein,* 96 Pa. Superior Ct. 580, 583), and yet refusing to permit the man branded as guilty of fraud to bring out the truth either by cross-examination or by affirmative testimony which was offered. See such cases as *Garfield v. Goldsby,* 211 U. S. 249; *Coe v. Armour Fertilizer Works,* 237 U. S. 413, 419; *Galpin v. Page,* 18 Wallace 350, 368-9; *Holden v. Hardy,* 169 U. S. 366, 389-390; *Central of Ga. R. R. Co. v. Wright,* 207 U. S. 127, 138; *Louisville R. R. Co. v. Stockyards Co.,* 212 U. S. 132, 143-4; *Hovey v. Elliott,* 167 U. S. 409, 414.

And in determining whether constitutional rights were denied, the *substance* of things, and not their mere form, governs: *Simon v. Craft,* 182 U. S. 427, 436; *Londoner v. Denver,* 210 U. S. 373, 385. Due process requires some-

thing more than the mere semblance of a hearing: *Chin Yow v. U. S.*, 208 U. S. 8, 12. The opportunity must be actual, and not merely illusory: *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673. Thus in this case the *semblance* of a hearing was granted. Had there been mere inadvertent errors in rulings upon evidence, they might have required reversal, but would not have amounted to a denial of due process of law. But when, as this record shows throughout, cross-examination of respondent Samuels, and the testimony of his witness Lockhart, and the testimony and evidence of petitioner, were all uniformly ruled in an attempt to build a *prima facie* case out of Samuels' self-serving suspicions, and *to exclude all evidence of what had actually happened* (the most important question in the case), the situation ceases to be one of mere trial errors, however fatal, and becomes one of *deprivation of the constitutional right to be heard.*

Windsor v. McVeigh, 93 U. S. 274, presents stern condemnation of a case wherein a lower court had cited a defendant to appear and answer, and then refused to permit his appearance and answer and entered a default judgment against him, pointing out that the only purpose of notice was to afford *opportunity to be heard*, and that the sham and deceptive proceeding was in fact a mere arbitrary edict, clothed in the form of a judicial sentence. It is respectfully submitted that there is no difference in principle between thus stating in advance that no defense will be considered, and the longer process here adopted of sustaining objections to every attempt to bring out the truth. In either event, no defense is permitted.

The excuse given by the Superior Court (R. 119-120, 125-127) for refusing to hear the truth from petitioner, to wit that the Orphans' Court proceedings and formal assignments pursuant thereto in the two decedents' estates showed

the interests of the estates in the bond and first mortgage to be less than the amount for which petitioner finally entered judgment thereon, and that this was conclusive on petitioner, is in itself a denial of Federal due process. Neither petitioner nor the mortgage debtor were parties to those proceedings or in any manner concerned therein. Due process could not admit them in evidence, to say nothing of making them conclusive against petitioner, who was not involved therein: *Hansberry v. Lee*, 311 U. S. 32, 40-41. There is good reason, as well as constitutional right, against what the courts below did with them. The only matters before the Orphans' Court had been the interests which the two estates of the successive deceased holders of the mortgage owned beneficially for distribution. These would have been identical, regardless of whether payments reducing that interest had been by the mortgage debtor in reduction of the debt, or by petitioner in installment purchase of the obligation. Yet the bald figures, in those cases to which he was not a party and in which the question was not and could not have been involved at all, were here taken as conclusive against petitioner's constitutional right to prove the truth in his defense.

Petitioner's claim of Federal constitutional right to be heard by evidence and by cross-examination to prove the actual facts before being deprived of his property was squarely raised and argued in the Supreme Court of Pennsylvania, and its decision affirming the court below could not have been made without necessarily denying such right.

Wherefore, it is respectfully prayed that the writ of *certiorari* issue as prayed for.

WILLIAM S. DOTY,
THOMAS A. THORNTON,
Counsel for Petitioner.

SUPPORTING BRIEF.

Opinions Below.

The opinion of Judge Gardner in the Court of Common Pleas is unreported. It is printed at R. 68 a-72 a. The opinion of the Superior Court is reported in 141 Pa. Superior Ct. 320, and in 14 At. (2d) 859. It is printed at R. 118-128. The opinion of the Supreme Court is reported in 340 Pa. 528, and in 17 At. (2d) 616. It is printed at R. 144.

Jurisdictional Statement.

The grounds for jurisdiction are set forth under II of the foregoing Petition for Writ of Certiorari, pages 14 to 17, and in the interests of brevity reference is respectfully made thereto.

Statement of the Case.

The Statement of the Matter Involved appearing under I of the foregoing Petition for Writ of Certiorari, states the case with appropriate page references to the printed record, and in the interests of brevity reference is respectfully made thereto, pages 1 to 14.

Argument.

> "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement. * * * No higher duty, no more solemn responsibility, rests upon this court than that of translating into living law and maintaining this constitutional shield, deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed, or persuasion." *Chambers v. Florida,* 309 U. S. 227, 241.

The constitutional right of due process of law is as firmly guaranteed by the Fourteenth Amendment where a deprivation of property is involved, as where life or liberty are threatened, and that the inhibited proceedings likewise injure the reputation for honesty and fair dealing of a lawyer of good standing affords them no firmer foundation.

The constitutional guarantee declares as well the right of the individual white citizen to be heard in his own defense before he is condemned as that of the corporation, the chinese, or the negro.

Where deprivation by a State of the right to be heard before being condemned takes the form of legislation, it is frequently possible to find a series of decisions upon similar enactments, establishing that they do or do not violate the constitutional safeguard, and in the latter event to see in advance that the supposed constitutional question has ceased to be "substantial."

But where the deprivation takes place by judicial conduct of a particular case, it can only be discovered by independent examination of the record by this court, if the state courts have refused the Federal Constitutional protection which is the supreme law of the land: *Pierre v. Louisiana,* 306 U. S. 354, 358; *Milk Wagon Driver's Union v. Meadowbrook Dairies,* 85 L. Ed. Adv. 497, 499, 502; *Smith v. O'Grady,* 85 L. Ed. Adv. 548, 549.

When Samuels commenced this litigation (R. 12 a-20 a) seeking to have this petitioner's prior lien reduced for Samuels' exclusive benefit, the whole factual basis thereof centered around his allegation that only $1,750.72 plus interest was *owing by the obligor on the bond and mortgage,* instead of the $4,436.65 for which the original judgment was entered, and *he so alleged it* at R. 14 a in paragraph (4).

If that allegation is true, this petitioner was guilty of fraud in entering the judgment for the larger amount, and the judgment was properly reduced.

But the whole question was one of *fact* on which this petitioner was entitled to produce evidence and to be heard thereon, and he was deprived of property without due process of law by being denied that constitutional right.

There was not a breath of evidence that the mortgage debtor had ever paid one cent in reduction of her indebtedness. There is only carefully shielded secondary evidence that the remaining balance *due the former holders of the mortgage* was $1,750.72 plus interest, without a hint as to whether the reduction was by payments *by the mortgagor looking toward satisfaction of the obligation,* or (as was the actual fact) *by this petitioner on account of installment purchase of the obligation,* leaving the debt of the mortgagor debtor unchanged and changing only the party entitled thereto.

The amount remaining beneficially due the legal holders of the bond and mortgage from *somebody* would be identical in either event. But the amount owing *by the mortgage debtor* on the obligations would be vastly different.

Throughout, this petitioner was uniformly denied the right to prove the truth that it was *he himself,* by his installment payments of purchase money, and *not the debtor* by payments in satisfaction of the obligation, who had reduced the remaining beneficial interest of the previous legal holders of the bond and mortgage, while records of proceedings to which he was not a party, and involving only correct statements of the remaining beneficial interests of the previous holders, were accepted against him as conclu-

sive that it was the *debtor* who had made the reducing payments in satisfaction of her obligation, which matter was *not involved or mentioned therein.*

It may be, and doubtless is true, that there may be a series of erroneous rulings upon evidence, constituting reversible error, but not amounting individually or collectively to a denial of due process of law, as guaranteed by the Federal Constitution.

But it is respectfully submitted that *somewhere* there must come a place where a party, whom a court has *refused to permit to prove his defense at all,* and has *refused to permit to cross-examine his opponent, or his opponent's witnesses, upon any question touching the real issues,* and has *refused to permit to prove any of the vital facts upon which his whole case depends,* and *who has heard his opponent permitted to prove everything by evidence of nothing* (such as at R. 25 a, 26 a, 30 a, 32 a, 36 a-37 a, 41 a, 42 a, 45 a, 46 a, 47 a-48 a, 55 a, 56 a, 57 a, 58 a, 59 a, 60 a, 61 a, 62 a, 63 a, 64 a, 65 a) has been quite as thoroughly deprived of his rights without *due process of law,* even while being permitted to sit in the court-room and watch the havoc, as he would have been if the door had been locked in his face.

It is respectfully submitted that there is no difference, either under the constitution or as to the practical and constitutional effect of the proceedings, between such a case as *Windsor v. McVeigh,* 93 U. S. 274, where the party was cited to appear and defend, and when he attempted to do so was told that his appearance would not be recognized and his defense would be stricken off without hearing him, and the case at bar where he was met with repetitions of "Objection overruled" whenever he objected to hearsay and to ambiguous records of *res inter alios acta,*

all of them as consistent with the truth as with what Samuels was trying to prove by them, and with repetitions of "Objection sustained," whenever he attempted to cross-examine his opponent and his witnesses, or to produce evidence of his own, tending to bring out the *actual truth as to the sole material question of fact on which the case should turn.*

In either event, he is *denied his right to be heard.*

And, if that line between mere error, however harmful, and *a complete denial of the Federal constitutional right to be heard,* can ever be crossed, it is respectfully submitted that it was crossed and the constitutional right denied this petitioner, throughout this strange deaf "hearing," and the successive appeals to the Superior Court and to the Supreme Court of Pennsylvania, in both of which the factual question was *assumed* against him, on ambiguous inadmissible evidence as to the remaining balance due the legal holders of the bond and mortgage from *him* on his contract for installment *purchase* of the obligations, and equally true under that interpretation without improper assumption that the debtor had ever paid one cent in *discharge* of *her* obligations, and while affirming the refusal to permit him either to cross-examine or to produce his offered direct and primary evidence that such was the *fact* (which should have been the only question in the whole case).

It takes a little longer,—and is less obvious,—to deny to a litigant his *constitutional right to be heard in his defense* by doing so more gradually, but as effectively, through a series of uniform rulings admitting evidence of nothing for his opponent, and excluding evidence of anything pertaining to his defense, as in the case at bar, than it does to tell him frankly at the start that his ap-

pearance will not be recognized, he will not be heard, and a default judgment entered against him, as was attempted in *Windsor v. McVeigh*, 93 U. S. 274.

The practical effect, and the denial of constitutional right, are identical.

If this device of denying petitioner a hearing through a series of refusals to hear any evidence from him as to the truth, while admitting as conclusive against him expurgated hearsay and irrelevant records of proceedings to which he was not a party, and which are at least as consistent with his contention as with his opponent's (since the actual question was not there involved at all), is a denial of constitutional due process, it is respectfully submitted that *certiorari* should be granted, to the end that the constitutional right urged in the Supreme Court of Pennsylvania may be vindicated, against its denial there.

If the device may be effective, it is respectfully submitted that *certiorari* should be granted, to the end that every court of every jurisdiction of every State of the United States, and every litigant therein, may know exactly where and how the line is drawn whereby property may be taken from a citizen without affording *actual* opportunity to be heard by evidence in his defense as to the important facts on which it is based. The Supreme Court of Pennsylvania, recognizing the question by its allowance of the appeal (R. 143), has not explained (R. 144).

Certainly your Honorable Court has never yet hinted at the existence of such a loophole in the Constitutional protection of due process of law, and in the case at bar the Supreme Court of Pennsylvania has merely declined to afford petitioner the protection guaranteed by the Fed-

eral Constitution, without discussion of the constitutional right there earnestly and specifically claimed, and on which it had allowed the appeal against opposition.

What your Honorable Court *has* said, and most recently, on the subject of the importance of Federal Constitutional rights, and the right and duty of this Court to examine them independently of State Court determinations, in decisions in complete accord with what has always been declared by this Court, and in three decisions handed down since that of the Supreme Court of Pennsylvania in the case at bar, is as follows.

Milk Wagon Driver's Union v. Meadowbrook Dairies, 85 L. Ed. Adv. 497.

(499). "Still it is of prime importance that no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made."

(502). "Here again, the state courts have not the last say. They must act in subordination to the duty of this court to enforce constitutional liberties even when denied through spurious findings of fact in a state court."

Smith v. O'Grady, 85 L. Ed. Adv. 548.

(549) "The judgment of the Nebraska Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment was illegal under the state's constitution or laws. But petitioner also contended that his imprisonment was illegal under the Federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proved in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of Federally protected rights. • • • That [the Federal] Constitution is the supreme law of the land, and 'Upon the state courts, equally with the courts of the Union, rests the obliga-

tion to guard and enforce every right secured by that Constitution.' "

Edwards v. United States, 85 L. Ed. Adv. 563.

(568) "The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates the results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

The record here shows beyond question that this petitioner never had that constitutionally guaranteed opportunity, and this in the face of extensive argument in the Supreme Court of Pennsylvania in an appeal specially allowed by that Court on a petition specifically raising the constitutional question.

It is respectfully submitted that the writ of *certiorari* should be granted, to the end that your Honorable Court may exercise its highest function of determining independently whether this petitioner's rights of property and of reputation have been taken away without affording him the actual right to be heard in his own defense, which is of the very essence of due process of law, under the Federal Constitution.

Respectfully submitted,

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